Office Supreme Court, U. S.
FILED
MAY 7 1917
JAMES D. MAHER
CLERK

No. 31 Orig.

Supreme Court of the United States.

October Term, 1916.

Ex Parte,

PARK SQUARE AUTOMOBILE STATION

v.

[redacted]

Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON, MASS.

Supreme Court of the United States.

October Term, 1916.

PARK SQUARE AUTOMOBILE STATION

v.

AMERICAN LOCOMOTIVE COMPANY.

Motion for Leave to File Petition for Writ of Mandamus.

And now comes the Park Square Automobile Station, the plaintiff in error in case entitled Park Square Automobile Station, plaintiff in error, against American Locomotive Company, defendant in error, and being case number 140 on the docket of this Honorable Court, and moves this Honorable Court for leave to file the accompanying petition for a writ of mandamus.

By its Attorneys,

SAWYER, HARDY, STONE & MORRISON,

ALBERT TERRIEN.

Supreme Court of the United States.

October Term, 1916.

PARK SQUARE AUTOMOBILE STATION

v.

AMERICAN LOCOMOTIVE COMPANY.

Petition for Writ of Mandamus.

(1) Respectfully represents the Park Square Automobile Station, plaintiff in error in the case pending before this Honorable Court and numbered 140 on the docket of this Honorable Court, hereinafter called the plaintiff.

(2) And the plaintiff further represents that, as appears by page 2 of the record in said case numbered 140, the plaintiff is a corporation duly organized under the laws of the State of Maine and formerly having a usual place of business at Boston in the County of Suffolk and Commonwealth of Massachusetts, and that the defendant is a corporation duly organized under the laws of the State of New York and having a usual place of business at Manchester in the County of Hillsborough and State of New Hampshire.

(3) And the plaintiff further represents that, as appears by the record in said case numbered 140, it instituted suit against the defendant in the Superior Court for Hillsborough County in the State of New Hampshire to recover damages for the breach of a

contract, the writ in said case being dated May 25, 1914, and being returnable to the Superior Court for Hillsborough County in said State of New Hampshire on the 3d Tuesday of September A.D. 1914.

(4) And the plaintiff further represents that, prior to the bringing of the said suit in the said Superior Court for Hillsborough County, it had instituted a suit against the defendant in the Superior Court for Suffolk County for said Commonwealth of Massachusetts, but that said last-named suit was dismissed because the defendant had withdrawn from the Commonwealth of Massachusetts, and the service attempted to be made upon it was held to be insufficient for that reason; and that, thereupon, the plaintiff instituted the above-entitled action in the Superior Court for Hillsborough County in the State of New Hampshire, the defendant there having property and a usual place of business.

(5) And the plaintiff further represents that, as appears by the record in said case numbered 140 (see pages 2, 3, 4, and 5), the transactions which gave rise to the said case occurred in said Boston; that the witnesses necessary to prove the plaintiff's case largely reside in and around said Boston or do business in said Boston; that trials in the said Superior Court for Hillsborough County in the State of New Hampshire are held either in the cities of Manchester or Nashua, New Hampshire, both of which cities are readily accessible to the City of Boston, and easily reached by train, the distances being only fifty-six miles and forty miles respectively.

(6) And the plaintiff further represents that, on or about September 17, 1914, the defendant filed a petition

and a bond in said Superior Court for Hillsborough County for the removal of the above-entitled case to the District Court of the United States for the Southern District of New York; that upon a hearing upon said petition the said Superior Court declined to give up jurisdiction of the said suit, denying the plaintiff's motion to remove the said suit to the said District Court of the United States for the Southern District of New York; that thereafter one Oliver W. Branch, presiding Justice of said Superior Court for Hillsborough County, ordered that a certain question of law arising in the trial of the case be transferred to the Supreme Court for final decision, said question of law being whether the order of the said Justice denying the defendant's petition to remove was correct; that thereafter the defendant abandoned its proceeding to remove the said case to the District Court of the United States for the Southern District of New York; that the said case reserved for the decision of the Supreme Court of the State of New Hampshire was discharged; and that on January 20, 1915, the defendant filed a petition for leave to amend its petition for removal theretofore filed in said State Court and petitioned to remove the said suit to the District Court of the United States for the Northern District of New York, and filed a new removal bond for said purpose.

(7) And the plaintiff further represents that said State Court denied the prayer for removal of the said case from the said State Court to the District Court of the United States for the Northern District of New York, but that the defendant duly entered its papers for removal in the said District Court of the United States for the Northern District of New York on or

about March 29, 1915; and that the plaintiff on the same day filed in the said District Court of the United States for the Northern District of New York a motion to remand the above-entitled suit on the ground, among other things, that this suit, which was one by a Maine corporation against a New York corporation brought in the said Superior Court of the State of New Hampshire, could not be removed to the District Court of the United States for the Northern District of New York, which motion to remand was denied by the District Judge (see 222 Fed. Rep. 979), so that the above-entitled suit, by orders of the Justice and of the Judge of the respective Courts, is now pending both in the Superior Court for Hillsborough County in the State of New Hampshire and in the District Court of the United States for the Northern District of New York.

(8) And the plaintiff further represents that, on April 29, 1915, it filed a petition for the issuance of a writ of error directed from the District Court of the United States for the Northern District of New York to the Supreme Court of the United States to bring before this Honorable Court the jurisdictional questions as to removal, which said writ of error was duly allowed and is now pending before this Honorable Court in the said case numbered 140.

(9) And the plaintiff further represents, as appears by the docket of this Honorable Court, that no motion to dismiss said writ of error has ever been filed, but that the defendant in its brief recently filed has argued that this writ of error should be dismissed for want of jurisdiction, on the ground that no final decree has been entered in the above-entitled case.

(10) And the plaintiff further represents that, if,

for the reasons urged in the defendant's brief, the above-entitled case must be tried out in full upon the merits in the said District Court of the United States for the Northern District of New York, before this Honorable Court may pass upon the jurisdictional question of removal, a serious hardship will be done the plaintiff, and thereby the plaintiff will practically be deprived of justice and of the right to try its case, for the reason that the said trial would have to take place within the Northern District of New York, and that, to get the benefit of the testimony of the witnesses for the plaintiff, it would be necessary to expend large sums of money toward the transportation, board, and hotel bills of the various witnesses necessary to prove the plaintiff's case, which expense would be so considerable as practically to prevent the plaintiff, which now is no longer actively engaged in business operations, from even trying its case at all in the said District Court of the United States for the Northern District of New York.

(11) And the plaintiff further represents that, in view of all the circumstances hereinbefore set forth in detail, the refusal to remand the said case to the State Court wherein it was started is a practical deprivation of the plaintiff's right to try its case at all, amounts to an abuse of discretion upon the part of the said District Judge, and calls for the application of the exceptional rule laid down in *Virginia* v. *Reeves*, 100 U.S. 313, at page 323, and referred to in *Ex parte Harding*, 219 U.S. 363, at page 369 (see also *Ex parte Roe*, 234 U.S. 70, at page 73).

Wherefore the plaintiff prays this Honorable Court that a writ of mandamus may issue, directing and

commanding the said District Judge, the Honorable George W. Ray, District Judge of the United States for the Northern District of New York, or whoever else may be the District Judge of said Court, to vacate such orders and decrees as have been made, refusing to remand the said case to the State Court wherein it was started, and to make such other and further orders and decrees as will be necessary or apt for remanding the above-entitled case to the State Court in which it was instituted; and for such other and further orders and decrees as to this Honorable Court may seem meet and proper and the circumstances of the case may require.

PARK SQUARE AUTOMOBILE STATION,
By its Attorneys,
SAWYER, HARDY, STONE & MORRISON,
ALBERT TERRIEN.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. BOSTON, January 11, 1917.

Then personally appeared Edward C. Stone, of counsel for the said plaintiff, and made oath that he had read the foregoing petition, and that the matters therein contained are true, except as to those matters which are stated to be upon information and belief, and, as to those, he believes them to be true.

Before me,
GAY GLEASON,
Justice of the Peace.

Office Supreme Court, U. S.
FILED
MAY 18 1917
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 31, Original.

EX PARTE THE PARK SQUARE AUTOMOBILE STATION, PETITIONER FOR A WRIT OF MANDAMUS.

THE ANSWER OF THE HONORABLE GEORGE W. RAY, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK, TO THE ORDER MADE IN THE SAID MATTER TO SHOW CAUSE WHY THE PRAYER OF THE SAID PETITION SHOULD NOT BE GRANTED.

21ST MAY, 1917.

I, the above-named judge, certify and return pursuant to the said order that all the proceedings in the suit instituted by the petitioner against the American Locomotive Company and mentioned in the petition are fully set out in the record of the said district court and a copy of the said record

and of the opinion given by the said judge upon hearing the matters complained of in the petition is annexed to and made part of this answer.

GEO. W. RAY,
Judge of the said District Court.

ROBERT G. DODGE,
Counsel for the said Respondent.

Office Supreme Court, U. S.
FILED
MAY 26 1917
JAMES D. MAHER
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1916

No. 31, Original

EX PARTE THE PARK SQUARE AUTOMOBILE STATION,
PETITIONER FOR A WRIT OF MANDAMUS

BRIEF FOR THE RESPONDENT

ROBERT G. DODGE
Counsel for the Defendant in Error

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In the Supreme Court of the United States

OCTOBER TERM 1916

No. 31, Original.

EX PARTE THE PARK SQUARE AUTOMOBILE STATION, PETITIONER FOR A WRIT OF MANDAMUS.

BRIEF FOR THE RESPONDENT.

The petitioner prays a writ of mandamus commanding the respondent the Judge of the District Court for the Northern District of New York to remand to the Superior Court of the state of New Hampshire an action which had been removed from that court by the defendant therein.

The action is a plea of the case brought by the Park Square Automobile Station against the American Locomotive Company in the Superior Court of New Hampshire for breach of contract (p. 2*), which was entered in that court at the September term 1914 (p. 6).

The defendant appeared specially and filed (p. 6) a petition (p. 7) and bond (p. 9) for removal of the action to the District Court for the Southern District of New York, alleging that the plaintiff was a corporation organised

*The pages referred to are those of the printed record of *Park Square Automobile Station* v. *American Locomotive Co.* in this Court No. 140, Oct. Term, 1916.

under the laws of Maine and a citizen of that state and that the defendant was a corporation organised under the laws of New York and a citizen of that state and its general offices were in the city of New York.

This application for removal was denied by the state court on the 28th September 1914 and the defendant excepted (p. 11).

On the 3rd December 1914 the defendant filed a motion for trial by the court or a reference to an arbitrator (p. 14), but no action was ever taken upon it.

Afterwards the defendant applied for leave to amend its petition for removal so as to pray for removal to the District Court for the Northern District, instead of the Southern District, of New York, and by alleging that its principal place of business was in Schenectady in the state of New York instead of in the city of New York (pp. 27–28), and the defendant filed with its application a bond corresponding with the proposed amendment (p. 30).

The amendment was allowed (so far as the court had power) and the amended petition denied, 25th January 1915 (p. 31), and no further proceedings were had in the state court.

The case was entered by the defendant in the District Court for the Northern District of New York on the 1st February 1915 (p. 68) and the defendant moved to amend its petition and to substitute an amended bond as above mentioned (p. 70).

The plaintiff moved to remand the case (p. 69) and the Judge of the District Court on the 28th April 1915 made an order denying the motion (p. 85). His opinion is printed in the record p. 71 (222 Fed. 979).

The plaintiff now makes this application for a mandamus to compel the Judge to remand the case.

Upon an order to show cause the Judge of the District Court for answer returned a copy of the record of his Court.

1. *The Remedy by Mandamus*

It is submitted that this is not a proper case for the issue of a writ of mandamus, and that it was so decided by this Court in the recent case of *Ex parte Harding*, 219 U. S. 363, 372, 380 (since applied in *Ex parte Roe*, 234 U. S. 70, 73).

In that case it was shown that, by a long line of decisions, of which *Ex parte Hoard*, 105 U. S. 578, was one, an order refusing to remand a cause to a state court could not be reviewed upon an application for a mandamus, and could only be reviewed upon appeal or writ of error like other decisions upon questions of jurisdiction (219 U. S. pp. 369, 372).

The cases of *Ex parte Wisner*, 203 U. S. 449, and *In re Moore*, 209 U. S. 490, in which such orders were reviewed upon applications for a mandamus, were referred to and expressly disapproved so far as they dealt with the questions upon such applications (219 U. S. p. 379).

In these two cases the objection to the order refusing to remand was the same as in the present case, namely, that the case had been removed to the wrong district. In the former it was held that, as the action had been removed into a district in which it could not have been originally brought in a federal court, it ought to have been remanded, and a mandamus was issued. In the latter there was the same objection, but this Court held that the plaintiff had waived it by taking a step in the action after the removal without raising the objection, and a mandamus was refused.

In the present case, there is the diversity of citizenship that gives a right of removal, and the action has been removed into the district where it could have been brought

in the federal court originally, and the plaintiff claims, notwithstanding the decision in *Ex parte Wisner*, 203 U. S. 449, that it could not properly be removed into that district.

The case of *Ex parte Harding*, 219 U. S. 363, is conclusive that the decision of the District Court refusing to remand the action cannot be reviewed on an application for a mandamus. The judgment in that case (at pp. 373–374, 376, 379) shows that the exceptional doctrine of *Virginia* v. *Rives*, 100 U. S. 313, has no application to this case.

It is submitted therefore that the application for a mandamus should be refused with costs.

2. *The Removal of the Action*

It is also submitted, if the merits of the decision of the District Court are considered, that the action was properly removed to the District Court for the Northern District of New York, which was the district of *the residence of the defendant*, and in which the action might have been brought according to the Judicial Code 1911, s. 51 (36 Sts. 1101).

The defendant followed the rule laid down in *Ex parte Wisner*, 203 U. S. 449, where an action was brought in a Missouri state court by a citizen of Michigan against a citizen of Louisiana, and the defendant removed it into the U. S. Circuit Court for the district of Missouri in which it was pending. The decision was that it could not be removed to that district, notwithstanding s. 3 of the act of 1888, (now Judicial Code 1911, s. 29), because by the previous section, it could only be removed to a district in which it might have been brought in the federal court in the first instance, and, as neither of the parties was a

citizen of Missouri, it could not have been brought in the federal court there (pp. 457, 460).

The present action being a suit of a civil nature between *citizens of different states* (Judicial Code 1911, s. 24) might have been brought in the district of the residence of *either the plaintiff or the defendant* (s. 51). It was consequently a suit of which the U. S. District Court in each of those districts was given jurisdiction by the act, and, the defendant, being a *non-resident* of the state where it was brought, had a right by s. 28 to remove it to the U. S. District Court for *the proper district*. The only question is what is the proper district, and *Ex parte Wisner*, 203 U. S. 449, 457, settles that it is the district where it might have been brought in the first instance, and not the district in which it is pending in the state court (see *In re Moore*, 209 U. S. p. 513). Otherwise it would result that a defendant could never remove a case, except when he was sued in the state of the plaintiff's residence, whereas the statute gives him a right to remove it whenever he is sued in any one of the 48 states *except* that of his own residence.

The Judge of the District Court accordingly decided that this case was removed to the proper district, and refused to remand it (record p. 71; 222 Fed. 979), and to the same effect are the decisions in

Stewart v. *Cybur Lumber Co.*, 211 Fed. 343 (Toulmin J., Alabama S. D.).

Keystone Development Co. v. *American Locomotive Co.*, 63 Pittsburgh Legal Journal 161 (Carpenter J., Common Pleas, Allegheny County, Pa., 1914) referred to by Ray J. in his judgment in this case (transcript pp. 82–83; 222 Fed. p. 991).

Cefalo v. *Pennsylvania Coal Co.* (Witmer J., Penn. M.D. No. 846, Oct. 1916).

The contrary has been decided in the following districts, viz.:

St. John v. *U. S. Fidelity Co.*, 213 Fed. 685 (Rose J., Maryland).

St. John v. *Taintor*, 220 Fed. 457 (A. N. Hand J., New York S. D.).

Pavick v. *Chicago Milwaukee & St. Paul Ry. Co.*, 225 Fed. 395 (Geiger J., Wisconsin E. D.).

Eddy v. *Chicago & North Western Ry. Co.*, 226 Fed. 120 (A. L. Sanborn J., Wisconsin W. D.).

The difficulty arises from the inconsistency between the 28th and 29th sections of the Judicial Code 1911 (36 Sts. 1094–5), relating to the removal of causes, which are as follows,

> Section 28. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. *Any other suit* of a civil nature, at law or in equity, of which the district courts of the United States *are given jurisdiction by this title*, and which are now pending or which may hereafter be brought, *in any State Court*, may be removed into the district court of the United States *for the proper district* by the defendant or defendants therein, *being non-residents of that State. . . . And where* a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such *citizen of another State*, may remove such suit into the district court of the United States for the proper district, at any time before the trial

thereof, when it shall be made to appear to said district court that *from prejudice or local influence* he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause, &c.

Section 29. Whenever *any party entitled to remove* any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, *for the removal* of such suit into *the district court* to be held *in the district where such suit is pending*, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court.

The provisions of the same act relating to the jurisdiction of the District Courts are as follows:

> Section 24. The district courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature, at common law or in equity, . . . or, where, the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and . . . is between *citizens of different States, &c.*

> Section 51. Except as provided in the five succeeding sections, no persons shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, *no civil suit* shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is *an inhabitant;* but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of *the residence* of either *the plaintiff or the defendant.*

It is perfectly plain that this is a suit "*of which* the district courts of the United States *are given jurisdiction by*" s. 24 of the act.

The suit is therefore one that the defendant being a non-resident of New Hampshire, has a right to remove, under s. 28, from the State court to the District Court *for the proper district* (*Louisville & Nashville Rld. Co.* v. *Western Union Telegraph Co.*, 218 Fed. 91, 101 (Cochran J., Kentucky E. D.)).

By s. 29, which describes the *procedure* for removal, it is provided that the defendant shall apply by petition to the State court for removal of the suit into the District Court *in the district where the suit is pending*, and shall afterwards

enter a copy of the record in that court and the cause shall proceed as if originally commenced there.

It might have been thought that s. 29 by these provisions defined the district of New Hampshire as *the proper district* for the removal of the suit. But in *Ex parte Wisner*, 203 U. S. 449, this Court held that the district where the suit was pending was not the proper district, when it was not the residence of either the plaintiff or the defendant, because s. 1 of the act of 1887 (corresponding to ss. 24 and 51 of the present act) limited the original jurisdiction of the then Circuit Court to suits brought in the district of the residence of either the plaintiff or the defendant (p. 456), and no suit was removable unless it could have been originally brought in that court (p. 457). And in the same case this Court said that the district of the residence of the plaintiff would be the proper district (p. 457).

This makes it plain that s. 29 *does not limit* the right of removal to cases where the proper district is the district where the suit is *pending*.

As this action might have been brought originally in the District Court in the district of the residence of either *the plaintiff* or the *defendant*, and as the only restriction on removal by the defendant is that he shall be a *non-resident* of the state in which the suit is pending, it follows that the district of the residence of *the defendant* was also the proper district as well as the district of the plaintiff's residence (as mentioned by Fuller C.J. in *In re Moore*, 209 U. S. p. 513).

The history of the legislation shows that the confusion arises only from the circumstance that in 1887 and 1888 a change was made in the provisions regulating *the right* of removal, without a corresponding change in *the procedure*.

The sections 28 and 29 of the present statute only continue in force (with immaterial variations), sections 2 and 3 of the acts of 1887 and 1888 (24 Sts. 553–554; 25 Sts. 434–435), and the sections 24 and 51 of the present statute correspond to section 1 of those acts.

These three sections of the acts of 1887 and 1888 are amendments of the three first sections of the act of 1875 (18 Sts. 470) in which no such inconsistency existed.

The inconsistency in the later acts was caused by the changes made in the sections 1 and 2 without a corresponding change in section 3 that would have made them consistent.

In each of these acts, s. 1 defines the jurisdiction of the then Circuit Courts, s. 2 specifies the right of removal, and s. 3 regulates the proceedings for removal.

The jurisdiction of suits "in which there shall be a controversy between citizens of different states" was the same under s. 1 of each act in all material respects, except as regards the district in which the suit might be brought.

In the act of 1875 (18 Sts. 470) the provisions of s. 1 regarding the *district* was

> "And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that of which he is *an inhabitant*, or in which he shall be *found* at the time of serving such process or commencing such proceeding, except" &c.

In the acts of 1887 and 1888 (24 Sts. 552; 25 Sts. 434) the provision was

> "and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is *an inhabitant;*

but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the *residence of either the plaintiff or the defendant.*"

As regards the right of removal, the provisions were different.

The provision of s. 2 of the act of 1875 (18 Sts. 470) was,

"That any suit of a civil nature, at law or in equity, now pending or hereafter brought *in any State court* . . . in which there shall be *a controversy between citizens of different States* . . . *either party* may remove said suit into the Circuit Court of the United States for the proper district."

But in the acts of 1887 and 1888 (24 Sts. 553; 25 Sts. 434) the provision, after providing for suits arising under the Constitution, &c., was

"Any other suit of a civil nature, at law or in equity, *of which* the circuit courts of the United States *are given jurisdiction by the preceding section*, and which are now pending, or which may hereafter be brought, *in any State Court*, may be removed into the circuit court of the United States *for the proper district* by the defendant or defendants therein being *non-residents of that State.*"

The provision of s. 3 of each of the acts is, like s. 29 of the present statute, that the party entitled to remove the suit shall apply for removal to the Circuit Court *in the district where the suit is pending.*

This provision was entirely consistent with the ss. 2 and 3 of the act of 1875, for the right of removal under s. 2 of that act did not in any way depend upon the case being one of which original jurisdiction was given by s. 1.

But it was not consistent with s. 2 of the acts of 1887 and 1888, which *limited the right* of removal to cases of

which *original jurisdiction* was given by s. 1 and provided that suits in such cases should be removed to *the proper district*, while s. 1 provided that suits of which original jurisdiction was given should be brought only in the district of *the residence of either the plaintiff or the defendant.*

(*a*) The inconsistency was caused by changing the provisions of the act of 1875 that gave *the right* of removal, without amending the provisions respecting *the procedure* for removal.

But the clauses containing these provisions were expressed (24 Sts. 552, 553) to be *amendments* of the corresponding sections of the act of 1875. The provisions limiting the right of removal and defining *the proper district* into which the removal shall be made, are the amendments of the former statute, while the provisions as to the manner of proceeding, so far as they are not changed, are only a *continuation* of those previously in force without amendment (*Steamship Co.* v. *Joliffe*, 2 Wall. 450, 458; *Bear Lake Irrigation Co.* v. *Garland*, 164 U.S. 1, 12). The amendments necessarily supersede the inconsistent provisions of the former statute.

If s. 3 of the act of 1875 had been left entirely untouched, and ss. 1 and 2 had been amended, as they were, so as to provide that suits might be removed to the Circuit Court for the district in which such a suit might have been commenced in that Court, there would be no doubt that the provision in s. 3, that the petition for removal should pray a removal into the Circuit Court for the district in which the suit was pending, would be superseded, so far as it was inconsistent with them. But that is very nearly what has happened. The 3rd section of the act of 1875 was only amended by changing the provision regarding the time of applying for the removal, and the rest was left as it was, except in immaterial particulars.

Amendment of a statute by enacting that it shall "read as follows," incorporating the amendments, does not have the effect of a new statute as to the old parts (*Ely* v. *Holton*, 15 N. Y. 595; *Homnyack* v. *Prudential Insurance Co.*, 194 N. Y. pp. 460–461).

(*b*) If, on the other hand, the act of 1888 were an entirely new statute, instead of only an amending statute, it would be necessary to modify the provisions relating to procedure (s. 3) to avoid the inconsistency with the provisions giving the right of removal (ss. 1, 2).

The rule of construction in such cases was stated by Lord Wensleydale in *Grey* v. *Pearson*, 6 H. L. C. p. 106, and often approved (*Caledonian Ry. Co.* v. *North British Ry. Co.*, 6 App. Cas. p. 131), as follows,

> "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed *statutes*, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some *absurdity*, or some *repugnance* or *inconsistency* with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further."

The provision of s. 3, that the suit shall be removed to the Circuit Court for the district in which it is *pending*, is inconsistent with the provisions of s. 1, as interpreted in *Ex parte Wisner*, 203 U. S. 449, limiting the districts in which the jurisdiction may be exercised, and does not supersede those provisions, according to the same decision.

By this decision, the right of removal is not limited to cases where the suit might properly be removed to the U. S. court for the district where it is pending. And it

would be absurd so to limit it, for then the only case in which a suit could be removed would be when it was brought in a State court in the district of *the residence of the plaintiff*. Yet there are 47 other States in which the defendant might have been sued, and s. 2 gives a right of removal of suit "brought *in any State court*" if the defendant or defendants are "*non-residents of that State.*"

This would be a plain case for modifying the words of s. 3, regulating procedure, so as to avoid the inconsistency and to prevent the absurdity of superseding by them the provisions of s. 2, relating to jurisdiction (see *Ayers* v. *Watson*, 113 U. S. p. 598).

Ex parte Wisner, 203 U. S. 449, 457, went on the ground that s. 2 was not superseded by s. 3 and that the suit might be removed to the U. S. court in another *proper district*, but there is a slip in the opinion of Fuller C.J. in the sentence (p. 457).

> "As it is the non-resident defendant alone who is authorised to remove, the Circuit Court for the proper district is evidently the Circuit Court of the district of the residence of the plaintiff."

The words "or of the defendant" ought to be added in order to make the sentence accurate, for the defendant was a non-resident of the state where the suit was brought, or he could not have removed at all, and it is pointed out at p. 456, that the proper district for bringing the suit in the Circuit Court would have been the district of the residence *of either the plaintiff or the defendant*. The mistake is corrected by Fuller C.J. in his dissenting opinion in *In re Moore*, 209 U. S. p. 513, where he says that the proper district intended by s. 2 was either of these districts. There is nothing to the contrary in the judgment of the majority

of the Court, which went on the ground that the objection to the removal to the Circuit Court in the district where the suit was pending had been waived by the plaintiff.

In the cases in which the District Courts have held in circumstances similar to those of the present case that the suit could not be removed to a district other than that where it was pending, controlling effect has generally been given to the provisions of s. 29 of the present statute relating to procedure.

In *Eddy* v. *Chicago & North Western Ry. Co.*, 226 Fed. 120, 125, A. L. Sanborn J. seems to have been influenced by the fact that the suit was removed to the district of the *defendant's* residence (Wisconsin) "to which defendants would not have been entitled to removal if the action had been begun in Wisconsin." But the action *was not* begun in Wisconsin, and the fact that he could not have removed it from a State court in Wisconsin, if it had been begun there, is no reason why he should not remove it from a State court in Minnesota, where it *was* begun, to the U. S. Court in Wisconsin.

In *New York Coal Co.* v. *Sunday Creek Co.*, 230 Fed. 295 (West Virginia S. D.) Keller J. held that an action against two corporations of different States could not be removed to the district of the residence of one of them, and that the words of s. 29 controlled. He also intimates that "the underlying principle of removal" (p. 297) does not exist when the defendant is sued in "a neutral state." But it is plain that the statute gives the defendant a right to have his case tried in a U. S. court when he is sued in the courts of a state of which he is a non-resident, and the right of removal in cases of prejudice or local influence is provided for by a different clause of the statute. The words of the statute are inconsistent with an intention to limit the right

of removal to cases where the suit is brought in the state of the plaintiff's residence, and they cannot be restricted by reference to an imaginary underlying principle.

3. *The Question of Waiver*

The defendant did not waive the right of removal by anything that it did in the State court after its application for removal had been refused by the State court and the defendant had excepted (p. 11).

The defendant might have tried the case out in the State court and taken every step that was open by way of defence, without waiving the right of removal which the State court had refused to recognise.

Railroad Co. v. *Koontz*, 104 U. S. 5, 15–17.
Cheshire Bank v. *Jaynes*, 224 Mass. 14, 19–20.

He does waive it, if, instead of confining himself to contesting the case alleged against him, he brings forward in the State court an affirmative claim in his own favor against the plaintiff or a third party.

Texas & Pacific Ry. Co. v. *Eastin*, 214 U. S. 153, 159.
Merchants Heat Co. v. *Clow*, 204 U. S. 286.

The defendant did not invoke the jurisdiction of the State court to enforce any claim whatever in its own favor. All that it did was to apply to that court to direct the manner in which the plaintiff's claim against it should be tried (transcript p. 14), and that was only a step in contesting the claim, and clearly not a waiver.

In *Hanover Bank* v. *Smith*, 13 Blatch. 224, all the steps taken by the defendant in the cause, which were held to

constitute a waiver, were taken before the defendant claimed to remove the case, while in the present case the application as to the mode of trial was made after his application to remove the action had been refused and the defendant had excepted.

ROBERT G. DODGE.

EX PARTE PARK SQUARE AUTOMOBILE STATION, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 31, Original. Submitted May 21, 1917.—Rule discharged June 11, 1917.

Mandamus will not lie to control the District Court upon a jurisdictional question when other modes of reviewing its decision (writ of error or certiorari) are provided by statute.

This rule obtains even though the decision complained of be manifestly incorrect and though a direct review by mandamus might avert great inconvenience and expense. *Ex parte Harding*, 219 U. S. 363, explained and followed.

So *held* where the object of the application was to require the District Court for the Northern District of New York to remand a case removed from a court of the State of New Hampshire.

Rule discharged.

THE facts are stated in the opinion.

Mr. Edward C. Stone for petitioner.

Mr. Robert G. Dodge for respondent.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Upon the ground that the American Locomotive Company, a corporation created under the laws of New York,

was carrying on business in the State of New Hampshire and amenable to the jurisdiction of the courts of that State, the petitioner, the Park Square Automobile Station, a Maine corporation, commenced its suit for breach of contract against the American Locomotive Company in a New Hampshire state court. In such court after service upon it the Locomotive Company prayed a removal of the cause not to the District Court of the United States for the District of New Hampshire, but to the District Court of the United States for the Southern District of New York, and its prayer to this effect was denied by the state court. Some time thereafter the prayer for removal was renewed, modified however by asking that the removal be ordered to the District Court of the United States for the Northern District of New York on the ground that the corporation was an inhabitant of that district and had its principal place of business there. This request being also denied, the Locomotive Company, executing a bond for removal, filed the record in the District Court of the United States for the Northern District of New York. The Automobile Company thereupon moved to remand, not on the ground that the case was not a removable one, but because it was solely entitled to be removed to the proper district, that is, from the state court in New Hampshire to the United States District Court of that State. This motion having been overruled (222 Fed. Rep. 979), the case was brought directly here upon the theory that the alleged error resulting from the refusal to remand was susceptible of being reviewed although no final judgment had been entered in the cause. At this term the writ of error taken for the purpose stated was dismissed because there was no final judgment, 243 U. S. 633, and thereupon on petition to that effect a rule to show cause why a mandamus should not be granted directing the District Court to reverse its ruling refusing to remand the cause was allowed and on a return of the Dis-

trict Court to that rule the subject is before us for consideration.

The contention of the petitioner is that manifest error was committed in taking jurisdiction on a removal of the cause from the state court of New Hampshire since the proper court, upon the assumption that the case was removable, was the District Court of the United States for the District of New Hampshire and that court alone.

At the threshold, however, we are met by the suggestion that, conceding for the sake of the argument that the lower court erred in refusing to remand and in taking jurisdiction, as such error was susceptible of being reviewed by the regular methods provided by the statute, that is, by certificate and direct review on the question of jurisdiction alone after final judgment, or by review of the Circuit Court of Appeals where allowed if the whole case were taken to that court, or by the exercise by this court of its power to issue a writ of certiorari in a proper case, there is hence no power to substitute the writ of mandamus as a means of reviewing for the express remedial processes created by the statute for such purpose.

It is not disputable that the proposition thus relied upon is well founded and hence absolutely debars us from reviewing by mandamus the action of the court below complained of, whatever may be our conviction as to its clear error, *Ex parte Harding*, 219 U. S. 363; *Ex parte Roe*, 234 U. S. 70, unless it be that by some exception the case is taken out of the reach of the control of the cases referred to. It is insisted that this case is such an exceptional one, first, because of the clearly erroneous construction of the statute upon which the court below based its assertion of jurisdiction and the strange result which arose from that construction, that is, the removal of a case pending in the state court of New Hampshire to a district court in the State of New York, and second, because of the grave wrong which would result from forcing the petitioner to

try its case in the State of New York at great inconvenience and expense as a preliminary to securing a review of the question of jurisdiction,—an expense and inconvenience which would be saved if by review now by means of a writ of mandamus the removal statutes be given their natural meaning and thus the wrong and confusion arising from their misconstruction would be avoided. And, in support of the exceptions thus asserted, reliance is placed on expressions contained in the opinion in *Ex parte Harding*, 219 U. S. 363, 373, by which it is contended they are sustained.

But conceding that the error which the proposition attributes to the ruling below is manifest, the conclusion drawn from the opinion in *Ex parte Harding* is obviously a mistaken one. Indisputably in that case the court was called upon to consider in a two-fold aspect some contrariety of views manifested in decided cases, first, as to the power to correct an unwarranted exercise of jurisdiction by way of proceedings in mandamus in a case where no method of review of such question was otherwise provided, and second, the right to resort to mandamus in disregard of and as a substitute for express and positive statutory regulations pointing out the method by which such review could be had. Bearing this in mind, it is plain that the language relied upon in *Ex parte Harding* related to the first class and established the doctrine that even in a case where no means of review were provided by statute, the writ of mandamus could be used only in exceptional cases calling for an exceptional remedy. But this did not in the slightest degree qualify or limit the comprehensive rule which was established as to the second class to the effect that, where statutory methods of review of questions of jurisdiction were provided for, they could not be disregarded, and therefore that there was no power to override the statutory provisions by resorting to the writ of mandamus. And the whole subject will be made

very clear by a consideration of the opinion in *Ex parte Roe*, 234 U. S. 70, which gave effect to and applied the rule laid down in *Ex parte Harding*.

Indeed, when the situation dealt with in *Ex parte Harding* is taken into view, it becomes apparent that the confusion and conflict which had imperceptibly arisen from obscuring the lines dividing the statutory methods for review of questions of jurisdiction and the effort to review them by the writ of mandamus which was corrected by the decision in that case would be recreated by now permitting a resort to the writ of mandamus in this case. And this also makes clear that however grave may be the inconvenience arising in this particular case from the construction which the court gave to the statute and upon which it based its assertion of jurisdiction, greater inconvenience in many other cases would necessarily come from now departing from the established rule and reviewing the action of the court by resort to a writ of mandamus instead of leaving the correction of the error to the orderly methods of review established by law.

Rule discharged.